

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PLU INVESTMENTS, LLC,

Plaintiff,

v.

INTRASPECT GROUP, INC., *et al.*,

Defendants.

Case No. C10-626RSL

ORDER GRANTING DEFENDANT
MARINA ANDRUSHCHAK'S
MOTION FOR EXTENSION OF TIME
AND AN AWARD OF ATTORNEY'S
FEES

I. INTRODUCTION

This matter comes before the Court on a motion filed by defendant Marina Andrushchak for extension of time and an award of attorney's fees. The defendant filed her motion after she missed the 14-day deadline imposed by Fed. R. Civ. P. 54(d)(2)(B)(i) to move for attorney's fees. For the reasons given below, the Court grants defendant's motion for extension of time and an award of attorney's fees.

II. DEFENDANT'S MOTION FOR EXTENSION OF TIME

On January 26, 2011, the Court entered summary judgment for the defendant. Dkt. # 80.

Under Fed. R. Civ. P. 54(d)(2)(B)(i), defendant had 14 days from that date to file a motion for attorney's fees. However, defendant did not file her motion until February 23, 2011, so her motion missed the February 9, 2011 deadline by two weeks.

In seeking an extension, defendant erroneously relies on Fed. R. Civ. P. 60(b). See Motion at p. 1. That rule, which governs relief from a final judgment, order, or proceeding, cannot serve as the basis for an extension to file the present motion.

As grounds for relief, defendant should have cited Fed. R. Civ. P. 6(b). Under Rule 6(b), the Court may, for "good cause," extend a deadline imposed by one of the Federal Rules of Civil Procedure.¹ The decision to extend a deadline is committed to the discretion of the Court. See In re Veritas Software Corp. Sec. Litig., 496 F.3d 962, 974 (9th Cir. 2007). A motion for extension of time filed *before* a deadline has passed should "normally . . . be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1259 (9th Cir. 2010). On the other hand, if such a motion is filed *after* the deadline has passed, the good cause standard becomes more stringent. In these cases, the Court should grant the motion only when the moving party missed the deadline due to "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B).

To determine whether defendant's failure to meet her deadline constitutes excusable neglect, this Court must begin with the four-factor test outlined in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993). See Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 825 n.4 (9th Cir. 1996).² The Pioneer test directs the Court to examine, at

¹ Certain exceptions apply, none of which is applicable here. See Fed. R. Civ. P. 6(b)(2).

² Although the discussion in Pioneer arose in the context of a motion filed under Fed. R. Bankr. Proc. 9006(b)(1), the Ninth Circuit has held that Pioneer's analysis is equally applicable to motions filed under Fed. R. Civ. P. 6(b). Yost, 92 F.3d 814, 825 n.4. In Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381 (9th Cir. 1997), the Ninth Circuit confirmed that the Pioneer test also applied to Rule 60(b)(1) motions. In practice, the excusable neglect standard is the same under Rules 6(b) and 60(b). See Brady ex rel. Estate of Brady v. Hanger Orthopedic Group, Inc., No. 08-16370, 348 Fed. Appx. 325, 326, 2009

1 a minimum, “[1] the danger of prejudice to the [non-moving party], [2] the length of delay and
2 its potential impact on judicial proceedings, [3] the reason for the delay, including whether it
3 was within the reasonable control of the movant, and [4] whether the movant acted in good
4 faith.” Yost, 92 F.3d at 825 (quoting Pioneer, 507 U.S. at 395). The test “is at bottom an
5 equitable one, taking account of all relevant circumstances surrounding the party’s omission.”
6 Pioneer, 507 U.S. at 395; see also Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004) (“[W]e
7 leave the weighing of Pioneer’s equitable factors to the discretion of the district court in every
8 case.”).

9 Although the Pioneer test does not supply an exclusive list of factors for consideration,
10 Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997), a district court abuses its
11 discretion if it does not consider each of the four Pioneer factors separately. See Ahanchian, 624
12 F.3d at 1261; Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1224 (9th Cir. 2000).

13 Applying the Pioneer test, the Court first finds that an extension will result in minimal
14 prejudice to the plaintiff. “Prejudice requires greater harm than simply that relief would delay
15 resolution of the case.” Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009).
16 Plaintiff’s counsel was well aware that defendant sought attorney’s fees. See Litchev Decl., Ex.
17 A, C (Dkt. # 83-2) (e-mails from plaintiff’s counsel suggesting his willingness to negotiate
18 attorney’s fees). Because plaintiff was on notice regarding defendant’s desire to settle the fee
19 issue, neither plaintiff nor its counsel can claim surprise. See Lackey v. Atl. Richfield Co., 990
20 F.2d 202, 206 (5th Cir.1993) (extension of time to file amended notice of appeal not prejudicial
21 because non-moving party was “already on notice” that moving party wished to appeal); cf.
22 Odegard v. VCA Crown Hill Animal Hosp., No. C09-0740JLR, 2010 WL 1875807, at *2
23 (W.D. Wash., May 10, 2010) (non-moving party “would likely suffer some prejudice . . .
24 because it would have to recommence litigating this case at additional expense and after a delay

25 _____
26 WL 3287721, at *1 (9th Cir., Oct. 14, 2009) (dictum).

1 of several months”).

2 The length of delay, and its potential impact on the judicial proceedings, is also minimal.
3 In In re Veritas, a panel of the Ninth Circuit suggested that a delay of 15 days was “not great.”
4 496 F.3d at 973. In Bateman, even a delay of one month was “still not long enough to justify
5 denying relief.” 231 F.3d at 1225 (no evidence that late filing would have delayed trial date).
6 Here, there is no evidence that defendant’s 14-day delay will have a substantial impact on the
7 judicial proceedings. The court has entered final judgment with respect to all parties, and only
8 the fee issue remains. Therefore, without suggesting that any particular amount of time
9 automatically qualifies as “excusable,” see Briones, 116 F.3d at 382 (per se rules disallowed
10 under the Pioneer test), the Court finds that defendant’s two-week delay was not significant.

11 Turning to the reason for delay, the Court must evaluate defendant’s claim that she
12 missed her deadline only because her attorney miscalculated plaintiff’s willingness to settle the
13 fee issue. Although she admits that plaintiff’s counsel never promised her anything, defendant’s
14 counsel claims she was “mistakenly led to believe” that plaintiff’s counsel would respond to her
15 request for fees before the filing deadline. Litchev Decl. at ¶ 11.

16 It is easy to criticize defendant’s counsel for failing to move for attorney’s fees in the
17 absence of a definite response from the opposing party. However, while relevant, the fact that
18 counsel made an error of judgment is not dispositive. In the Ninth Circuit, the term excusable
19 neglect unquestionably “covers cases of negligence, carelessness and inadvertent mistake.”
20 Bateman, 231 F.3d at 1224. The key issue is not the existence but the degree of counsel’s
21 negligence, carelessness, and inadvertence.³

23 ³ Plaintiff opposes defendant’s motion on the ground that defendant failed to demonstrate that
24 filing a timely fee motion would have been “impossible or impracticable.” Opposition at pp. 3-4 (Dkt. #
25 85) (quoting Bender v. Freed, 436 F.3d 747, 750 (7th Cir. 2006)). This contention misses the mark for
26 two reasons. First, the contention looks only to the third Pioneer factor (*i.e.*, the reason for delay).
Under Ahanchian, 624 F.3d at 1261, “a district court abuses its discretion by failing to engage in the
[full] four-factor [Pioneer] test.” Second, an impossibility or impracticability standard has no place

1 To illustrate, in Bateman, an attorney arguably acted negligently but still petitioned for an
2 extension successfully. 231 F.3d at 1225. The attorney left the country without filing a response
3 to the opposing party's summary judgment motion. Id. at 1223. Eight days after the deadline
4 passed, the attorney returned to the United States. Id. Sixteen more days passed before the
5 attorney finally contacted the court asking for relief from the judgment entered during his
6 absence. Id. Despite the attorney's obvious "lack of regard for his client's interest and the
7 court's docket," a panel of the Ninth Circuit concluded that the attorney's errors "resulted from
8 negligence and carelessness, not from deviousness or willfulness." Id. at 1225. The court then
9 ordered the district court to grant an extension on remand. Id.

10 As in Bateman, the error of judgment committed by defendant's counsel resulted from
11 negligence and carelessness, rather than from "deviousness or willfulness." Like the attorney in
12 Bateman, counsel here also showed "lack of regard for [her] client's interests and the court's
13 docket." 231 F.3d at 1225. However, unlike in Bateman, where the attorney blamed the delay
14 on "jet lag and the time it took to sort through the mail," id. at 1223, counsel's disregard can be
15 attributed to her mistaken belief about the status of her fee negotiation. Thus, counsel's reason
16 for delay is significantly stronger than the attorney's reason in Bateman. Id. at 1225.

17 Moving to the final Pioneer factor, the Court finds that the error of judgment committed
18 by defendant's counsel was made in good faith. After all, counsel's error only hurt her own
19 client. Furthermore, defendant's counsel insists that she brought the present motion as soon as
20 she realized plaintiff's counsel did not intend to negotiate further. Litchev Decl. at ¶ 12.
21 Although defendant's counsel might have filed earlier, she did not "purposely ignore" her
22 deadline. Stock v. Wisman, No. C05-1214MJP, 2005 WL 2206901, at *2 (W.D. Wash., Sept.
23 12, 2005) (neglect not excusable where pro se litigant, who was formerly a practicing lawyer,
24 missed deadline while finishing house repairs).

25
26 under the equitable Pioneer test, which disallows per se rules. Briones, 116 F.3d at 382.

1 In the end, the Court must decide defendant's motion for extension by balancing the four
 2 Pioneer factors. Defendant missed the filing deadline due to her counsel's own neglect.
 3 However, counsel's neglect was mitigated by the lack of prejudice to the plaintiff, the
 4 insignificance of the delay, and the fact that counsel committed her error in good faith. After
 5 weighing the equities, the Court grants defendant's motion for extension of time.

6 **III. DEFENDANT'S MOTION FOR ATTORNEY'S FEES**

7 Having granted defendant's motion for an extension of time, the Court now considers
 8 defendant's motion for attorney's fees. In a diversity case, "the law of the state in which the
 9 district court sits determines whether a party is entitled to attorney fees." Carnes v. Zamani, 488
 10 F.3d 1057, 1059 (9th Cir. 2007).

11 Under Washington law, a court may award "reasonable" attorney's fees to the prevailing
 12 party in a contract dispute. See RCW 4.84.330. According to the statute:

13 In any action on a contract . . . , where such contract . . . specifically
 14 provides that attorney's fees and costs, which are incurred to enforce the
 15 provisions of such contract . . . , shall be awarded to one of the parties, the
 16 prevailing party, whether he is the party specified in the contract or lease
 17 or not, shall be entitled to reasonable attorney's fees in addition to costs
 18 and necessary disbursements.

19 Id. For the purposes of this provision, "an action is on a contract if the action arose out of the
 20 contract and if the contract is central to the dispute." Seattle First Nat'l Bank v. Wash. Ins.
 21 Guar. Ass'n, 116 Wn.2d 398, 413 (1991). A "prevailing party" is simply a "party in whose
 22 favor final judgment is rendered." RCW 4.84.330. "The language of the statute is mandatory
 23 with no discretion except as to the amount." Kofmehl v. Steelman, 80 Wn. App. 279, 286
 24 (1996).

25 Here, there is no question that the underlying action is "on a contract." Although
 26 defendant was not named in the guaranty underlying this action, see Complaint, Ex. B (Dkt. # 1),
 27 the statute allows her to recover fees solely due to her status as a prevailing party. RCW
 28 4.84.330; see also Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489 (2009) ("By its

1 plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions
2 bilateral.”). There is also no question that defendant is a “prevailing party” within the meaning
3 of the statute. See Order (Dkt. # 80) (granting defendant’s motion for summary judgment).⁴

4 The only remaining question is whether the \$5,180.00 in fees requested by defendant is a
5 reasonable amount. The underlying contract does not specify a method for calculation of fees.
6 “In the absence of a predetermined method set forth in the contract itself, the proper method for
7 the calculation of a reasonable fee award is the lodestar method.” Crest Inc. v. Costco
8 Wholesale Corp., 128 Wn. App. 760, 773 (2005); see also Karl B. Tegland, 14A Washington
9 Practice: Civil Procedure § 37:15 (2010 ed.) (“In the absence of a specialized statute,
10 Washington follows the lodestar method of calculating fees”). Under the lodestar method, the
11 fee is determined by multiplying the attorney’s reasonable hourly rate by the number of hours
12 reasonably expended on the lawsuit. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581,
13 594 (1983). The fee may be adjusted, if warranted. Id.

14 Defendant’s counsel calculated her fees by multiplying her hourly rate of \$200.00 by the
15 amount of time she spent on her client’s case, or 25.9 hours.⁵ Litchev Decl. at ¶ 13; see also id.,
16 Ex. D (billing records). Counsel’s hourly rate is reasonable in this geographic area.
17 Furthermore, counsel’s billing records demonstrate that the tasks she performed were reasonable
18 in light of the relief sought. The total amount is also reasonable given the level of success
19 achieved. Finally, it is worth noting that plaintiff does not contest counsel’s calculation other
20 than to suggest that defendant is not entitled to any attorney’s fees whatsoever (or “nominal”
21 fees, at best). Opposition at pp. 4-5. Finding the request reasonable, the court awards defendant

22
23 ⁴ Plaintiff claims that it “released” defendant from its lawsuit “immediately upon confirming she
24 had no liability.” Opposition at p. 4. In fact, defendant’s participation in this lawsuit ended only after
she was forced to move for summary judgment, which this Court granted. Dkt. # 80.

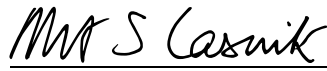
25 ⁵ Importantly, this calculation excludes the time counsel spent drafting the portion of this motion
26 related to her request for an extension. See Litchev Decl., Ex. D. Given that counsel created her own
need for an extension, any request for such fees would have been denied.

1 fees in the amount of \$5,180.00.

2 **IV. CONCLUSION**

3 For the foregoing reasons, the Court GRANTS defendant's motion (Dkt. # 83) for an
4 extension of time and for attorney's fees in the amount of \$5,180.00.

5
6 DATED this 12th day of April, 2011.

7
8 
9 Robert S. Lasnik
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26